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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1249

JAMES V. SIDARY a/k/a JIM SIDNEY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on November 30, 1967.

CITATIONS TO OPINIONS BELOW

The judgment and commitment of the District Court is unreported and is printed in Appendix B hereto, *infra*, p. A1. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, p. A4, is unreported to this date.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 30, 1967, and is set out in Appendix B, p. A4, *infra*. Rehearing was denied on February 12, 1968. On February 29, 1968, Mr. Justice White extended the time within which to file this petition for certiorari to and including April 12, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether the trial judge abused the discretion given to him in Rule 17 (b) of the Federal Rules of Criminal Procedure as amended in denying the petitioner's request to have witnesses subpoenaed for the presentation of his defense as an indigent defendant.

2. Whether the order entered by the trial judge denying the defendant the right to have the vast majority of his witnesses subpoenaed at government expense was a violation of his right to have compulsory process for obtaining witnesses in his behalf as guaranteed by the Sixth Amendment to the United States Constitution.

3. Whether the ruling of the trial judge in denying the subpoenas requested deprived the defendant of his right to due process of law as guaranteed to him by the Fifth Amendment to the United States Constitution.

RULE INVOLVED

The rule involved is Rule 17 (b) of the Federal Rules of Criminal Procedure effective on the date of trial. The rule has since been amended, but the original text appears at Appendix A, *infra*, p. A1.

STATEMENT

The petitioner was an employee of the Speers Hereford Farms, later called American Hereford Farms, Inc. He had worked in various capacities with the Farms from May, 1961, to January, 1964, when his job as office manager was terminated. The indictment of the grand jury was returned on August 20, 1964, charging the petitioner with fourteen counts of mail fraud in violation of 18 U.S.C. §1341 and 18 U.S.C. §2, and one count of conspiracy incorporating all prior counts in violation of 18 U.S.C. §371. On December 23, 1965, a motion was filed with the trial court asking that an order issue from that court ordering the issuance of subpoenas to eighty-nine witnesses for the five original defendants, Stephen M. Speers, Jerry Anden, James V. Sidary, Emery Anden, Sr. and Emery Anden, Jr. A properly executed affidavit accompanied the motion indicating the name, address and testimony of witnesses requested. The petitioner requested that subpoenas issue to three veterinarians, two cattle buyers, three truck drivers, one herdsman and general manager, and eighty satisfied customers. All five defendants had been previously permitted to proceed *in forma pauperis* as indigent defendants. All these witnesses would have testified to the experience they had with the petitioner and the operations of Speers Hereford Farms and American Hereford Farms, Inc. On December 30, 1965, the trial court entered its order allowing subpoenas to issue to three veterinarians, two cattle buyers, two truck drivers, two satisfied customers from Kansas, and one satisfied customer from each of three states, Nebraska, Iowa and Missouri. The Court denied the defendants' motion on the other seventy-five satisfied customers.[1] The cause proceeded to trial on

1. At Volume I, page 140, record on appeal, a copy of the trial court's order appears.

January 10, 1966, in the Federal District Court for the District of Kansas at Topeka, Kansas. The government, respondent herein, was allowed to subpoena, over the repeated objections of petitioner's counsel, over one hundred thirty-six witnesses other than witnesses directly involved in the fifteen counts.[2] Not all of the more than one hundred thirty-six witnesses were called to testify by the respondent, but none were excluded by the Court. On February 4, 1966, after approximately four weeks of trial, the jury returned a verdict finding the defendant guilty on the first fourteen counts and not guilty on the fifteenth count of the indictment.[3]

On April 18, 1966, after a pre-sentence investigation report, the trial court sentenced the petitioner to eighteen months imprisonment on each of the fourteen counts, the sentences to run concurrently.[4] After denial of the motion for a new trial, the petitioner perfected an appeal to the United States Court of Appeals for the Tenth Circuit. The verdict and judgment of the trial court was affirmed[5] and a petition for rehearing was denied. The Circuit Court felt that the petitioner had been given an opportunity to present an adequate defense and that his Constitutional rights under the Sixth Amendment had been protected.

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2. Objections to witnesses called by the respondent as dissatisfied customers and for no other purpose are resplendent throughout the trial transcript.

3. Volume I, pages 228-9 of the record on appeal.

4. Volume I, p. 258 of the record on appeal.

5. Appendix B, *infra*.

REASONS FOR GRANTING THE WRIT

I.

The Limitation of Witnesses Requested by the Petitioner and the Failure to Limit Witnesses Requested by the Respondent Constituted an Abuse of Discretion by the Trial Court under Rule 17 (b) of the Federal Rules of Criminal Procedure Resulting in a Denial of the Petitioner's Constitutional Rights As Guaranteed by the Fifth and Sixth Amendments of the Constitution of the United States.

Before Rule 17 (b) of the Federal Rules of Criminal Procedure was amended, effective July 1, 1966, the text of the rule as it applied to the case at bar provided that a Motion supported by an Affidavit should be submitted to the Court by the Defendant and should reflect the names, addresses and testimony of the witnesses sought to be subpoenaed. The Petitioner herein, joined in the Motion and Affidavit by other co-defendants requesting that a total of eighty-nine subpoenas issue to witnesses necessary for the presentation of a defense by the Petitioner at the trial of this case. The vast majority of the witnesses requested were customers who had dealt satisfactorily with Speer's Hereford Farms and American Hereford Farms, Inc. and with this Petitioner. A fundamental requisite in the proof of the Respondent's case herein was the necessity of showing a scheme or artifice on the part of the Petitioner to defraud customers with whom he dealt on behalf of his employer. The witnesses requested by the Petitioner were necessary to the Petitioner's defense in refuting the Respondent's allegation of a scheme to defraud. The trial court, on the other hand, allowed the Petitioner only five satisfied customers, two of whom were from Kansas and one each from the States of Nebraska, Iowa and Missouri. The severe and unreasonable limitation upon witnesses

allowed to the Petitioner by the trial court and classed as satisfied customers would appear to be for economic reasons only. It is respectfully submitted that a great many of the witnesses requested by the Petitioner were from the eastern part of the United States since the original situs of the operation of the farms was at Belle Vernon, Pennsylvania, and that because of the distance required for their travel the Court felt that the expense would be too great. However, pursuant to the rule for compulsory process of witnesses for indigent defendants, the trial court's discretion extends only in determining whether the witness is material to the defense and in turn whether the Petitioner cannot safely go to trial without the presence of the witness. It is submitted that in the instant case the Petitioner was not allowed a sufficient number of witnesses, classed as satisfied customers, to allow him to present an adequate defense in his own behalf. There is no question in this case but that the Petitioner was an indigent defendant proceeding *in forma pauperis* and entitled to the protection extended to him by Rule 17 (b) of the Federal Rules of Criminal Procedure.

As opposed to the unreasonable limitation imposed upon the Petitioner in restricting witnesses to be subpoenaed in the interest of his defense, the Respondent, without any restraint whatsoever, subpoenaed more than one hundred fifty witnesses at government expense from all parts of the nation. Only fourteen of the witnesses subpoenaed were necessary for the proof of the fourteen substantive counts charged against the Defendant. The record shows that the vast majority of the witnesses subpoenaed by the government and later called to the witness stand were dissatisfied customers. The record also shows that counsel for the Petitioner, throughout the course of the trial, repeatedly objected to the continual flow of the Re-

spondent's dissatisfied customers across the witness stand. There being no statutory restriction upon the calling of witnesses by the Respondent in this case, the Court did not have the opportunity to restrict the number of subpoenas requested by the Respondent. However, the Court clearly had the opportunity during the course of the trial to restrict the number of dissatisfied customers called to the stand by the Respondent. The only plausible reason for the calling of the vast number of dissatisfied customers by the Respondent is that they wanted to show that even apart from the fourteen count witnesses called, a general dissatisfaction with the way in which the business was operated existed. They further intended to indicate to the jury that the alleged scheme or artifice to defraud extended over a great many more people than the original fourteen counts alleged. The resulting prejudice to the Petitioner and the obvious abuse of discretion by the trial court in limiting his witnesses clearly appears in comparing the presentation of the Respondent's case and the limited presentation of the Petitioner's case. The vast majority of the 136 witnesses subpoenaed by the government, exclusive of count witnesses, were dissatisfied customers and when compared with the five satisfied customers allowed to the Petitioner, the jury was prejudicially overwhelmed by the Respondent's case. The trial court had the opportunity, had it seen fit to order the issuance of the subpoenas requested by the Petitioner, to allow the Petitioner the opportunity of defending against the many dissatisfied customers called by the Respondent. However, the trial court failed in its duty to allow the Petitioner to present an adequate defense.

The unreasonable limitation upon witnesses requested by the Petitioner and the failure of the trial court to sustain objections to the cumulative Respondent witnesses

resulted in a clear abuse by the trial court of its discretion under Rule 17 (b) of the Federal Rules of Criminal Procedure. That rule does not anticipate nor does it intend to allow a trial court, under the guise of discretion, to circumvent the vested statutory and constitutional rights of the Petitioner.

Pursuant to the Sixth Amendment of the United States Constitution the Petitioner is guaranteed the right to have compulsory process for obtaining witnesses in his favor. The logical result of an abuse of discretion by the trial court under Rule 17 (b) of the Federal Rules of Criminal Procedure is the violation and the infringement of the Petitioner's right under that Amendment. It is respectfully submitted that the Court has heretofore in its wisdom carefully interpreted and zealously guarded the rights of indigent defendants and that the right guaranteed to this Petitioner for the compulsory process for obtaining witnesses in his behalf is no less a right than his right to the assistance of counsel. A most recent case of this Court is the case of *Washington* v. *State of Texas,* 338 U.S. 14 (1967), dealing with the right to offer the testimony of witnesses and to compel their attendance, though not factually identical to the case at bar, it indicates the law applicable to the instant case. At page 19 of that opinion this Court said:

> The right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.

Discretion of a trial judge can effectively destroy compulsory attendance of witnesses as it did in the instant case as surely as the Texas statute did in the *Washington* case. It is respectfully submitted that the interpretation

of the Sixth Amendment guarantee of compulsory process as set forth in that case applies to the case at bar.

Any denial or abridgement of the right to compulsory attendance of witnesses which results in a violation of the Petitioner's guarantee under the Sixth Amendment of the United States Constitution correspondingly results in a violation of the Petitioner's guarantee of due process of law as set forth in the Fifth Amendment of the United States Constitution. This Court, in the *Washington* case, *supra*, at page 19 said: "This right [compulsory attendance of witnesses] is a fundamental element of due process of law." Thus, the effect of this Court's decision in that case, through its clear and positive language, is to impose upon the trial judge the responsibility of protecting and insuring an indigent defendant's right to compulsory attendance of witnesses so as to guarantee him due process of law. The discretion provided for in Rule 17 (b) of the Federal Rules of Criminal Procedure should not be allowed to destroy the Petitioner's right to due process of law.

Rule 17 (b) in effect at the time of the trial provided as follows: "The Court or a judge thereof *may* order at any time that a subpoena be issued upon motion or request of an indigent defendant." (Emphasis added). However, the rule as amended and effective July 1, 1966, following the trial of this case, provides as follows: "The Court *shall* order at any time that a subpoena be issued for service on a named witness upon an ex parte application of a defendant. . . ." (Emphasis supplied). It is respectfully submitted that the substitution in the amended rule of the word "shall" for the word "may" in the original rule clearly diminishes or removes the discretion allowed to the trial court in the issuance of subpoenas to witnesses requested by indigent

defendants and brings the language and intent of the rule within the guarantees of the Sixth Amendment of the United States Constitution. It is submitted that the language of the rule in effect at the time of the trial rendered the rule unconstitutional as it permitted trial court discretion in the protection of an absolute and fixed right to compulsory process of witnesses. No trial court should have the discretion to effectively destroy an indigent defendant's constitutional guarantees. This Court has on many occasions established those rights as separate, equal and unequivocal.

II.

An Interpretive Decision by This Court on an Indigent Defendant's Right to Compulsory Process of Witnesses As Guaranteed by the Sixth Amendment in Light of Rule 17 (b) Is Needed.

It is respectfully submitted that this Court has not recently had the opportunity of rendering a decision based upon facts similar to the facts in the case at Bar. Certainly, the question presented in the instant case arises in a great many state and federal trial courts across this country. The bench and bar is in need of an interpretive decision which would correlate the rights of defendants under the Sixth Amendment with the language contained in Rule 17 (b) of the Federal Rules of Criminal Procedure. One of the most recent cases dealing with compulsory process of witnesses is the case of *Washington* v. *State of Texas, supra,* however, that case did not deal with a federal crime but rather with a state statute denying the right of a co-defendant to testify in behalf of an accused. The case at bar varies with the *Washington* case in that it involves one of the Federal Rules of Criminal Procedure

and the due process clause of the Fifth Amendment rather than the due process clause of the Fourteenth Amendment. This Court has in recent years done much to insure the rights of indigent defendants to the assistance of competent counsel for the presentation of their defense and it is likewise imperative that these same defendants have the opportunity to obtain compulsory process of witnesses in their favor. To have competent appointed counsel representing them and then to be unable to obtain the witnesses necessary to the presentation in their behalf of a defense by that appointed counsel renders the guarantee of competent assistance of counsel moot. Clearly the right to compulsory attendance of witnesses is no less a right or guarantee than that of the assistance of counsel. However, there are no recent interpretive decisions of this Court establishing the right to compulsory attendance of witnesses on an equal footing with the right to the assistance of able and competent counsel.

It is respectfully submitted that the opinion by the Circuit Court of Appeals for the Tenth Circuit does not give serious consideration to the Petitioner's constitutional rights. The opinion erroneously assumes that the trial court in denying all but five of the Petitioner's satisfied customers was allowing the Petitioner to present an adequate defense. The Circuit Court failed to interpret and equate the right of compulsory process with the other rights guaranteed under the Sixth Amendment of the United States Constitution.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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March, 1968.